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No. 97-1354

In the Supreme Court of the United States

OCTOBER TERM, 1997

WANDERLON ANN BARNES, PETITIONER

v.

ARTHUR LEVITT, JR.,
CHAIRMAN, SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a district court has jurisdiction over a federal employee's discrimination claim brought under Title VII, 42 U.S.C. 2000e-16(c), when the employee has failed to exhaust her administrative remedies, in that she filed an administrative discrimination complaint with her employing agency, but refused thereafter to cooperate with the agency's review of her claim or to provide the agency with any information regarding the alleged discrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 118 F.3d 404. The opinion of the district court (Pet. App. 13-42) is reported at 911 F. Supp. 1038.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1997. A petition for rehearing was denied on November 19, 1997. Pet. App. 43-44. The petition for a writ of certiorari was filed on February 17, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Wanderlon Ann Barnes, a black female, was employed by the Securities and Exchange Commission (SEC) as an attorney in its Houston office from August 1988 until September 1991. During her first year, petitioner had a good relationship with her two supervisors, Joseph C. Matta (a hispanic male) and Joy M. Boddie (a black female). Pet. App. 1-2. In September of 1989, petitioner refused (without explanation) to attend a training conference in Austin, Texas, that other attorneys in the Houston Office attended.[1] Petitioner alleges that, after her unexplained refusal to attend the conference, her relationship with Matta and Boddie soured, and they thereafter treated her unfairly. *Id.* at 2-3.

2. In November 1989, Adrian Martinez (a Hispanic male) was hired as an attorney at the SEC's Houston office at the same salary level that petitioner was then earning. Pet. App. 3. After learning that Martinez was promoted, petitioner sought counseling with the SEC's Office of Equal Employment Opportunity (EEO). *Ibid.* The specific issues raised by petitioner were racial discrimination in the promotion of Martinez and disparate treatment. *Ibid.* After the EEO Counselor finalized her counseling report, she sent petitioner a notification of her right to file a formal administrative EEO complaint. *Ibid.*

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[1] Petitioner states that she did not attend the meeting because she was afraid of flying and did not want to drive to Austin with Matta, in part, because she had heard from a coworker that Matta had sexually harassed female employees in the past. Pet. App. 2. Matta, however, never asked petitioner to travel to the conference with him; nor did he know the reason for petitioner's refusal. *Ibid.*

3. On August 23, 1991, petitioner's attorney, S. Beville May, sent the SEC a formal EEO complaint. Subsequently, on September 3, 1991, May submitted an amended formal EEO complaint.[2] Pet. App. 3. Petitioner never signed either complaint, as was required by the EEOC regulations then in effect. *Id.* at 3-4 (citing 29 C.F.R. 1613.214(a)(1) (1991)). Nevertheless, after receiving these allegations, the SEC began an investigation and placed Matta on indefinite leave status. *Id.* at 4.

Under the applicable regulations, petitioner was required to cooperate with the SEC's investigation and to provide a sworn statement if the SEC requested it. See 29 C.F.R. 1613.216(b)(2)-(3) (1991). Several days after the filing of the administrative complaint, the SEC met with May, petitioner's counsel. At that meeting, the SEC requested that petitioner provide basic information, such as the names of the SEC officials who engaged in the misconduct, the specific conduct engaged in, the identities of the alleged victims, and the time frame of the alleged

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[2] The amended EEO complaint alleged, *inter alia*, that from the autumn of 1989 until September 1991: (1) petitioner was subjected to a campaign of racially and sexually motivated harassment by Matta; (2) petitioner was subjected to disparate treatment and work sabotage; (3) petitioner was retaliated against after filing her informal EEO complaint; (4) she and others at the Houston office were sexually propositioned by Matta; (5) "other senior officials," including former regional administrator Edwin Tomko, created a hostile and offensive environment, and their conduct included rape, sexual assault, sexually suggestive mannerisms, leering, and dirty and racist jokes; (6) petitioner's mail was tampered with, her telephone calls monitored, and her life threatened after filing her EEO complaint; and (7) she had been constructively discharged from the SEC. Pet. App. 4.

conduct. Pet. App. 4. The same requests were made in writing to May. DX 76. In response, May refused to provide such information, stating instead that "you will get it in discovery." Pet. App. 5. In a letter to the SEC, May stated, "[i]t is correct that I have declined to provide detailed information supporting the allegations in [petitioner's] Formal Complaint." *Ibid.* May later explained that, rather than "provide any specifics" to the SEC, she "intended to file a complaint in court." *Ibid.*[3]

By letter to her attorney, the SEC informed petitioner that she had an obligation under the applicable regulations to cooperate with the investigation and that the failure to do so could cause cancellation of her complaint. Pet. App. 6. The letter requested that petitioner provide relevant sworn testimony and documents relating to her allegations. *Ibid.*

On January 29, 1992, the SEC informed petitioner by letter that if she maintained her lack of cooperation, the agency would cancel her complaint. Petitioner then agreed to provide a deposition, which was scheduled for February 5, 1992. Pet. App. 6. On February 4, 1992, May informed the SEC that petitioner would not attend the deposition because she had surgery scheduled for the next week. Neither May nor petitioner made any attempt to reschedule the

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[3] While declining to discuss the complaint with the SEC, May granted an interview to a newspaper reporter with the Houston Chronicle. Pet. App. 5. A front page article quoted May as stating that an EEOC "complaint filed August 27 claims Matta sexually assaulted a female employee" and "that Matta overlooked rapes by other men in the six-person office." *Ibid.* See also *Matta* v. *May*, 118 F.3d 410 (5th Cir. 1997) (discussing Matta's defamation claim against May arising out of the newspaper article).

deposition or to claim that petitioner's health prevented her participation in the scheduled deposition. *Ibid.*

Unable to complete its investigation due to petitioner's refusal to cooperate, the SEC asked May to agree to extend the 180-day period for filing suit, which would have expired on February 23, 1992. May refused. Pet. App. 6. Then, on February 20, 1992, the SEC sent petitioner a letter canceling her complaint for her failure to cooperate. The letter detailed petitioner's allegations, the agency's investigation, and the need for more information from petitioner in order to understand and evaluate her claims. *Id.* at 6-7.

4. On March 23, 1992, petitioner filed this civil action under Title VII, 42 U.S.C. 2000e and the Equal Pay Act of 1963, 29 U.S.C. 206. After a bench trial, the district court awarded petitioner $275,426 in back pay under Title VII, $53,983.50 for "lost fringe benefits" under Title VII, $210,468 as liquidated damages under the Equal Pay Act, $283,856 in attorneys' fees and enjoined the agency from future discrimination. Pet. App. 7.

5. The court of appeals reversed and held that the district court lacked jurisdiction to hear petitioner's Title VII claims. Pet. App. 1-12.[4] For federal employees seeking to assert Title VII discrimination claims, the court explained, exhaustion of the administrative process is a jurisdictional prerequisite to filing suit, and good faith cooperation with the agency's investigation is necessary to satisfy the exhaustion re-

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[4] The Court further held that there was no jurisdiction over petitioner's Equal Pay Act claims in district court because they were for more than $10,000. Pet. App. 12. Petitioner does not challenge that ruling in her petition to this Court.

quirement. Pet. App. 8-10. The court further explained that it was well established that federal employees who resort to the administrative process "but do not cooperate in the proceedings can thereby fail to exhaust their administrative remedies." *Id.* at 9. "Good faith effort by the employee to cooperate with the agency and the EEOC and to provide all relevant, available information is all that is required to demonstrate an exhaustion of administrative remedies." *Id.* at 10.

After reviewing the undisputed record, the court of appeals concluded that "[petitioner] did not act in good faith or make reasonable efforts to provide the necessary relevant information to the SEC after filing her formal complaint. She repeatedly refused to answer questions, provide details, make a statement, give a deposition or even sign her complaint." Pet. App. 10. The court noted that the SEC attempted to conduct an "extensive investigation" in the absence of cooperation by petitioner, but that ultimately without additional detail from her regarding the alleged discrimination it could not assess or resolve her claims. *Ibid.* Thus, the court concluded, "as to her gender and sexual harassment claims, which were only marginally referenced in the informal process, she wholly failed to exhaust her administrative remedies." *Ibid.*

The court noted that the factual bases of petitioner's claims of racial discrimination were better developed during the informal phase of the administrative process than were her sexual harassment and gender discrimination claims. Pet. App. 10. The court concluded, however, that "[c]ooperation in an earlier informal process is not sufficient to satisfy the obligation to exhaust administrative remedies by

cooperating in a subsequent formal investigation." *Id.* at 11. The court also found that petitioner's claims changed substantially between the informal process and her formal administrative claims. *Id.* at 10-11.

Likewise, the court rejected petitioner's argument that it would have been futile to cooperate with the formal investigation of her claims and specifically found that "the record does not support the conclusion that the * * * formal complaint process would have proven futile if [petitioner] had participated in good faith." Pet. App. 10. Rather, the court found that the SEC took petitioner's "formal and informal complaint seriously, devoting extensive time and resources to investigating the claims, as well as suspending Matta until the allegations could be resolved." *Id.* at 11.[5] "Had [petitioner] complied with the SEC's requests for cooperation, the agency could have ruled on the merits of her complaint. Due to [petitioner's] refusal, it was unable to do so and canceled the complaint." *Ibid.* Thus, the court concluded, because the record demonstrates that petitioner's refusal frustrated the agency's ability to assess and resolve her claims, "the agency did not abuse its discretion in canceling the complaint in this case." *Ibid.* And because petitioner failed to exhaust her administrative remedies, the court further concluded, the district court lacked jurisdiction over her Title VII claims. *Id.* at 11-12.

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[5] In an obvious typographical error, the opinion states that the "EEOC" took "Matta's" complaint seriously, when in fact it was the SEC that took petitioner's complaint seriously.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals.

1. The court of appeals correctly concluded that the district court lacked jurisdiction because petitioner failed to exhaust the administrative claim process.

a. Under Title VII, a federal employee seeking redress for employment-related discrimination must first file a timely charge of discrimination with the employing agency. 42 U.S.C. 2000e-16(c); 29 C.F.R. 1613.214 (1991). The claimant is then authorized to file a civil action (1) within 30 days of receiving notice of a final administrative decision on the complaint,[6] or (2) if, after 180 days from the date of filing a complaint with the agency or an appeal with the Equal Employment Opportunity Commission (EEOC), there has been no administrative decision. See 42 U.S.C. 2000e-16(c); 29 C.F.R. 1613.281 (1991). As this Court explained in *Brown* v. *General Services Administration*, 425 U.S. 820, 832 (1976), Title VII "permits an aggrieved employee to file a civil action in a federal district court * * * . Attached to that right, however, are certain preconditions. Initially the complainant must seek relief in the agency that has allegedly discriminated against him." If a federal employee fails to exhaust the administrative process, the district court has no jurisdiction over the

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[6] Effective November 21, 1991, Congress amended 42 U.S.C. 2000e-16(c) to provide claimants 90 days from receipt of notice of a final administrative decision within which to file a civil action. Civil Rights Act of 1991, Pub. L. No. 102-166, Tit. I, § 114(1), 105 Stat. 1079.

employee's Title VII claims. See *Woodman* v. *Runyon*, 132 F.3d 1330, 1341 (10th Cir. 1997); *Wilson* v. *Peña*,79 F.3d 154, 164-165 (D.C. Cir. 1996); *Porter* v. *Adams*, 639 F.2d 273, 276 (5th Cir. 1981); *Edwards* v. *Department of Army*, 708 F.2d 1344, 1346 (8th Cir. 1983). See also *McCarthy* v. *Madigan*, 503 U.S. 140, 144-145 (1992).

To exhaust the administrative process, it is not sufficient for a federal employee merely to file an administrative complaint and then wait the requisite 180 days before filing suit.[7] Rather, as every circuit that has addressed the question has held, exhaustion requires "good faith participation in the administrative process." *Munoz* v. *Aldridge*, 894 F.2d 1489, 1492 (5th Cir. 1990). Accord *Wilson*, 79 F.3d at 164-165; *Greenlaw* v. *Garrett*, 59 F.3d 994, 997 (9th Cir. 1995), cert. denied, 117 S. Ct. 110 (1996); *Khader* v. *Aspin*, 1 F.3d 968, 971 (10th Cir. 1993); *Wrenn* v. *Secretary, Dep't of Veterans Affairs*, 918 F.2d 1073, 1078 (2d Cir. 1990), cert. denied, 499 U.S. 977 (1991); *Wade* v. *Secretary of Army*, 796 F.2d 1369, 1377 (11th Cir. 1986);

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[7] Petitioner here was required to exhaust a two-step administrative process. First, a federal employee must notify an agency EEO counselor of any allegedly discriminatory act. See 29 C.F.R. 1613.214(a)(1)(i) (1991). If the EEO counselor is unable to resolve the matter, the counselor notifies the employee of his or her right to file a formal administrative complaint. See 29 C.F.R. 1613.213(a) (1991). The employee must then submit a formal complaint to the employing agency within 15 days. See 29 C.F.R. 1613.214(a)(1)(ii) (1991). Only after the agency has investigated the formal complaint and issued a final decision (or has failed to issue such a decision within 180 days) may an employee bring suit in district court. See 42 U.S.C. 2000e-16(c). An employee may also seek review by the Equal Employment Opportunity Commission before seeking judicial review. See 29 C.F.R. 1613.281 (1991).

Woodard v. *Lehman*, 717 F.2d 909, 913-914 (4th Cir. 1983); *Jordan* v. *United States*, 522 F.2d 1128, 1133 (8th Cir. 1975). Thus, an employee will not be deemed to have exhausted the administrative process where she fails to cooperate with the investigation and to provide the agency with adequate information to permit it to investigate the charge of discrimination. See, *e.g.*, *Munoz*, 894 F.2d at 1493 ("[T]he purpose of exhaustion is to give the agency the information it needs to investigate and resolve the dispute between the employee and the employer. *Good faith effort by the employee to cooperate with the agency * * * and to provide all relevant, available information is all that exhaustion requires.*") (quoting *Wade*, 796 F.2d at 1377).

b. The undisputed record here fully supports the court of appeals' conclusion that petitioner failed to cooperate and that her refusal to cooperate thwarted the agency's ability to adjudicate her claims. Under the governing EEOC regulations, see 29 C.F.R. 1613.216(b)(2)-(3) (1991), petitioner was required to cooperate with the agency's investigation and to provide a sworn statement if the agency requested one. After filing her formal administrative complaint, however, petitioner's attorney expressly told the agency that petitioner would not cooperate with its investigation. As the court of appeals observed, when the agency asked petitioner's counsel for information regarding the alleged discrimination, harassment, and assaults, she refused to provide any information, saying "you will get it in discovery." Pet. App. 5 (quoting PX 9, at 4). Petitioner's counsel then sent a letter to the SEC stating: "It is correct that I have declined to provide detailed information supporting the allegations in [petitioner's] Formal Complaint of

Discrimination to the Commission." *Ibid.* (quoting R14, at 80). Petitioner's counsel subsequently explained that rather than "provide any specifics," she "intended to file a complaint in court." *Ibid.* (quoting DX 76; R34, at 29).

The record also shows that the agency requested on at least *eleven* separate occasions (DX 76, 80, 83, 86-89; PX 9; R13, at 341; R14, at 111, 100-101) that petitioner provide such basic information as what happened to her and when. Yet despite the agency's repeated attempts to obtain sufficient information to resolve her claim, petitioner *never* provided any of the requested information. Despite clear warnings from the SEC that failure to cooperate would leave the agency no choice but to cancel her complaint (Pet. App. 6; DX 89), petitioner also failed to comply with the agency's request that she provide a sworn statement or deposition. See Pet. App. 10 ("[Petitioner] did not act in good faith or make reasonable efforts to provide the necessary relevant information to the SEC after filing her formal complaint. She repeatedly refused to answer questions, provide details, make a statement, give a deposition or even sign her complaint.").

With the 180-day period for filing suit drawing to a close, the SEC asked petitioner's counsel to agree to extend the filing period so that the agency would have an opportunity to complete its investigation (with petitioner's cooperation) before she filed suit. Pet. App. 6. Petitioner's counsel refused. *Ibid.* Only then did the agency cancel petitioner's complaint for her failure to cooperate. *Id.* at 6-7.

As the above demonstrates, and as the court of appeals found, the agency took petitioner's allegations seriously and made every effort to attempt to investi-

gate her claims. See Pet. App. 10-11; PX 9. However, petitioner's refusal to cooperate with SEC investigators denied the agency any meaningful opportunity to do so.[8] Thus, after reviewing the record, the court of appeals properly concluded:

> [Petitioner] did not act in good faith or make reasonable efforts to provide the necessary relevant information to the SEC after filing her formal complaint. She repeatedly refused to answer questions, provide details, make a statement, give a deposition or even sign her complaint. Even after extensive investigation, the [agency] did not have the information it needed to pursue and resolve [petitioner's] dispute with the SEC.

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[8] Petitioner contends that her cooperation was not necessary, citing an SEC announcement in December 1991 that "there was no wrongdoing in the Houston office." Pet. 14. In fact, the "public announcement" referenced by petitioner supports the court of appeals' conclusion that petitioner's cooperation was necessary to resolve her claims. The "announcement" was a press release issued by the SEC when the Inspector General (IG) closed his investigation of the criminal aspects of petitioner's administrative complaint (*i.e.*, petitioner's unexplained allegations of rape and assault by "senior" SEC officials). PX 62. The press release explained that the IG closed his criminal investigation because petitioner refused to provide any information about her claims. The press release explained: "[d]espite repeated requests * * *, the complainant and her attorney refused to provide formal or informal testimony or other information to corroborate the allegations or to assist investigators." PX 62, at 2.

> Had [petitioner] complied with the SEC's requests for cooperation, the agency could have ruled on the merits of her complaint. Due to [petitioner's] refusal, it was unable to do so.

Pet. App. 10-11.

2. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. Petitioner contends (Pet. 12) that the court of appeals' decision conflicts with the decision of the District of Columbia Circuit in *Wilson*, *supra*, and the Eleventh Circuit in *Wade*, *supra*. No such conflict exists. To the contrary, the District of Columbia and the Eleventh Circuit opinions petitioner relies on are fully consistent with the Fifth Circuit's opinion below and confirm that the district court lacked jurisdiction over petitioner's Title VII claims.[9]

In *Wilson*, the employee cooperated with the agency's investigation of the merits of his administrative discrimination claims, and the agency was able to issue an administrative ruling in his favor. Thus, the District of Columbia Circuit held that there was no basis for dismissing the employee's subsequent suit challenging the amount of the agency's

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[9] Contrary to petitioner's suggestion (Pet. 12, 15), the Fifth Circuit did not defer to the agency or simply accept the agency's views on the question of whether petitioner cooperated in good faith. The factual record was largely undisputed regarding petitioner's cooperation (or lack thereof) and the information the agency was able to obtain as to her claims. The court reviewed the record and determined as a matter of law that petitioner did not cooperate in good faith and that her refusal to cooperate prevented the agency from adjudicating her claims. Having so determined, the court then found that the agency did not abuse its discretion in canceling the complaint. Pet. App. 11.

backpay award. 79 F.3d at 164-168. In so holding, however, the court recognized that "[i]f a complainant forces an agency to dismiss or cancel the complaint by failing to provide sufficient information to enable the agency to investigate the claim, he may not file a judicial suit." *Id.* at 164. The court explained that this bar on filing suit should apply where an employee fails to cooperate in good faith and where the want of cooperation frustrates the agency's ability to investigate the merits of the claims. *Id.* at 164-165.

Likewise, the Eleventh Circuit in *Wade* held that "a complainant who fails to provide the agency with the information necessary to evaluate the merits of his or her complaint cannot be deemed to have exhausted administrative remedies." 796 F.2d at 1376. Indeed, the court in *Wade* remanded the case to the district court to determine whether the employee had acted in "good faith" and in compliance with regulatory requirements. *Id.* at 1378-1379. "Otherwise," the court explained, "the complainant might be dilatory at the administrative level, knowing that he can get into federal court anyway." *Id.* at 1376 (quoting *Johnson* v. *Bergland*, 614 F.2d 415, 418 (5th Cir. 1980)).

Here, in contrast, petitioner did not cooperate at all regarding the merits of her claims during the formal administrative claim process. As the court of appeals found, the record establishes that "[petitioner] did not act in good faith or make reasonable efforts to provide the necessary relevant information to the SEC after filing her formal complaint. She repeatedly refused to answer questions, provide details, make a statement, give a deposition or even sign her complaint." Pet. App. 10. Furthermore, petitioner's failure to cooperate frustrated the SEC's efforts to investigate and

resolve her claim. *Id.* at 11 ("Had [petitioner] complied with the SEC's requests for cooperation, the agency could have ruled on the merits of her complaint. Due to [petitioner's] refusal, it was unable to do so."). Under the standard articulated by the District of Columbia Circuit in *Wilson* and the Eleventh Circuit in *Wade*, as well as every other circuit to have addressed the issue, it was appropriate for the Fifth Circuit below to hold that petitioner was barred from bringing an action in federal court because her failure to cooperate frustrated the SEC's investigation of her claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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